



IN THE
Supreme Court of the United States

October Term, 1976

No.

76-1779

ROBERT L. CHAZIN

Petitioner,

vs.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL
SAVINGS AND LOAN ASSOCIATION AND T. D. SERVICE
COMPANY

Respondents.

Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

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Respondents.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

Petitioner. Robert L. Chazin, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*) is unreported. The judgment of the District Court is set forth in App. B, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on December 2, 1976. On February 1, 1976 the Court denied a petition for rehearing and rejected a suggestion for rehearing en banc. This order is set forth in App. C, *infra*. On March 30, 1977

the time for filing a petition for certiorari was extended by Mr. Justice Rehnquist to and including June 13, 1977. Jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether a federal court may accord a state court judgment a greater preclusive effect than it would have in the courts of the rendering state;
2. Whether, under California law, a California declaratory judgment concludes matters neither litigated nor declared;
3. Whether California's non-judicial foreclosure law involves sufficient state-action to require the imposition of the due process and equal protection strictures of the Fourteenth Amendment.;
4. Whether, under the facts of the case, the procedures used to effect the foreclosure and sale of petitioner's home satisfied the due process and equal protection requirements of the Fourteenth Amendment.

Constitutional Provisions and Statutes Involved

The due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States; the Civil Rights Act of 1871, Section 1, 17 Stat. 13, 42 U.S.C. 1983; Act of March 3, 1911 (as amended), 37 Stat. 1901, 28 U.S.C. 1331 (federal question jurisdiction of the district courts); Act of June 25, 1948, 62 Stat. 947, 28 U.S.C. 1738 (full faith and credit to state court judgments); sections 1060, 1062 of the California Code of Civil Procedure, as they existed in 1973 (the California Declaratory Judgment Act); and portions of the California non-judicial foreclosure law, sections 2924, 2924b of the California Civil Code, as they existed in 1973.

These statutes are set forth in Appendix D.

Statement

The facts, which are essentially not in dispute, may be summarized as follows:

Petitioner purchased a home at 2916 Elmwood Court, Berkeley, California on December 1, 1970. The purchase price was financed by respondent Twin Pines Federal Savings & Loan Association ("Twin Pines"). On February 24, 1971, petitioner executed a deed of trust in favor of Twin Pines, a copy of which is contained in Appendix E.¹ This deed of trust, which is on the standard California form, contained a statutory "request for notice," pursuant to section 2924b of the California Civil Code, to the effect that copies of any notices subject to the provisions of that section—i.e. notices relating to default, foreclosure or sale—be sent to 2322 Russell Street, Berkeley, California. This was petitioner's address at the time the deed of trust was executed. The deed contains no warning of the effect of designation of a given address in the request for notice, nor any indication as to what steps a homeowner must use to effect a change of address.

Shortly thereafter, petitioner moved to the Elmwood Court property. The Elmwood Court address, along with some supplementary addresses supplied by petitioner to Twin Pines, and connected with his then employment in Southern California, was used by petitioner and Twin Pines for all correspondence. The Elmwood Court address was petitioner's legal residence for all purposes; petitioner voted in the precinct containing that address and it appeared on his driver's license. Petitioner filed a change of address, directing that mail be forwarded from the Russell Street address to the Elmwood Court address at the time he moved to the latter and, except as set forth in this petition, received no mail at the Russell Street address after he took possession of the Elmwood Court property in the spring of 1971.

On July 18, 1973, more than two years after petitioner moved into the Elmwood Court residence, respondent T. D. Service Company ("T.D."), acting as trustee for respondent Twin Pines, recorded a notice of default on the Elmwood Court property

¹ The deed was contained in the record on appeal, Doc. 19, Ex. "A".

² A change of address is effected by executing a new "request for notice," acknowledging it before a notary public and then recording it. California Civil Code, section 2924b.

and mailed it to the *Russell Street* address. By 1973 the change of address order filed with the post office had, of course, expired³ and petitioner did not learn of the existence or filing of the notice until July 17, 1973, and then only through fortuitous circumstances unconnected with any of the respondents.⁴

Petitioner immediately undertook efforts to arrange to have funds to pay the amounts demanded by respondents, which included substantial trustee's and other fees, sent to him. On September 21, 1973, more than 90 days after the date of filing of the notice of default, but less than 90 days after the date petitioner learned of the impending foreclosure, petitioner made full tender of all amounts previously demanded by respondents, which, petitioner asserted, they were not entitled to because of the manner in which the notice was given. Respondents contended that the reinstatement of the loan at that time was a matter of creditor's grace and declined to reinstate the loan unless further sums were paid.

On September 12, 1973, petitioner commenced an action in the superior court, seeking declaratory relief *only*, which prayed for a declaration that respondents Twin Pines and T. D. were obliged to send a copy of any notice of default to the Elmwood Court address, i.e. the address where petitioner customarily received mail and which was the property which was security for respondent's loan. Petitioner contended that a solitary notice sent to an address at which appellant had not lived or received mail was a nullity, and that respondents were estopped to rely on such notice for compliance with the statutory requirements of section 2924b of the California Civil Code.⁵ No

³The Court may wish to take judicial notice of regulations of the Post Office, as in force on June 18, 1973, providing that change of address orders expire one year after the filing thereof.

⁴Petitioner was out of town at the time and telephonically requested his bank to prepare a cashier's check and forward it to Twin Pines. When, thereafter, Twin Pines mailed the check back to the bank, the latter notified petitioner of the fact.

⁵California courts have had occasion to consider this sort of situation before. See, e.g., *Lupertino v. Carbahal* (1973) 35 C.A. 2d 742, 111 Cal. Rptr. 112.

damages, or other relief, other than an injunction *pendente lite*, were prayed for. In particular, the complaint did not make any constitutional attack on the relevant California statutes, contrary to the assertion contained in the opinion of the Court of Appeals, set forth herein in Appendix A. The complaint is set forth herein in Appendix F, and is contained in the record before the Court of Appeals at 73.

Petitioner sought and obtained a preliminary injunction, enjoining respondents from proceeding with the foreclosure sale,⁶ pending a trial of the action in chief. Thereafter, the action proceeded to a trial to the Court. Respondents contended, as they had at the hearing on the preliminary injunction that they had complied with all applicable California statutes and that that was all they were required to do. Petitioners contended that respondents were estopped to rely on a notice mailed to an address they know to be obsolete.

At the conclusion of the trial, the court rendered judgment in favor of respondents herein and subsequently, judgment was entered in favor of respondents and the preliminary injunction dissolved. Petitioner attempted to stay the foreclosure sale and filed an undertaking on appeal in an amount fixed by the Court, \$10,000.00. Respondents took the position that the judgment was self-executing and noticed a foreclosure sale for November 8, 1974.

One November 7, 1974, and acting on instructions from counsel George A. Lydon,⁷ who had represented petitioner in the superior court litigation, and who was in Los Angeles on that date, petitioner prepared and filed a *pro se* complaint and filed it in the district court. The district court issued an order to show cause (re preliminary injunction) but declined to issue a

⁶In California parlance these sales are referred to as "trustee's sales." See discussion of the California non-judicial foreclosure law, *infra* p. 12.

⁷Petitioner is at present a first-year law student and had acted as Lydon's law clerk for several years prior. Lydon contracted cancer of the vocal chords and is at present unable to speak. For that reason he is of counsel hereon rather than attorney of record. Should certiorari be granted, petitioner will provide counsel for oral argument.

temporary restraining order. Accordingly, the foreclosure sale took place on November 8, 1974.

The federal complaint alleged jurisdiction under 28 U.S.C. 1331 and 42 U.S.C. 1983. It attacked the foreclosure statute as unconstitutional as applied to petitioner. Petitioner moved the Court for a preliminary injunction setting the sale aside; this was denied.⁸ Thereafter, the Court granted summary judgment in favor of respondents, holding that the prior state court judgment was res judicata. The Court also remarked that, in its view, California's non-judicial foreclosure law did not involve sufficient state action to subject it to constitutional strictures of due process. For the latter proposition, the District Court relied *inter alia* on *Adams v. Southern California First National Bank* 492 F. 2d. 324, (9 cir., 1975), which had just been decided.

Petitioner filed a timely notice of appeal. Petitioner's opening brief was confined to the question of res judicata. Petitioner contended that the Court of Appeals was required by the statutory analog of the full faith and credit clause, 28 U.S.C. 1738, to apply state law to determine the preclusive effect of the prior California judgment; that under that law, the prior California judgment, a declaratory judgment obtained pursuant to sections 1060 *et. seq.*, concluded only matters actually litigated and did not operate, via the doctrine of res judicata, to bar further litigation in state or federal courts of constitutional (or, for that matter, other) questions not actually litigated in the prior state court action. Further, petitioner argued that the foreclosure sale and recording of the notice of default constituted *two* causes of action under California law, not one, so that the prior state court judgment functioned only by way of collateral estoppel. Petitioner did not raise the question of state action in his opening brief but suggested that the judgment be reversed on the res judicata question alone, possibly with directions to the district court to abstain while the question of the res judicata effect of a California declaratory judgment was litigated in state court in accordance with the principles announced by the Ninth Circuit in *Garfinkle v. Wells Fargo Bank* (9 cir., 1973) 483 F. 2d.

⁸ Petitioner retained counsel for the action in the district court.

1074 and by this Court in *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964).

Respondents contended that a California declaratory judgment had the same preclusive effect as any other California judgment. They also contended that, even if not barred by reason of the prior state court judgment, appellant's section 1983 action would have to be dismissed on state action grounds.⁹ Petitioner's reply brief accordingly responded at length to this assertion.¹⁰

A panel of the Court of Appeals affirmed the judgment of the District Court on December 2, 1976. A timely petition for rehearing and a suggestion of appropriateness of rehearing *en banc* was denied on February 1, 1977. Pending the disposition of this petition, the mandate of the Court of Appeals has been stayed pursuant to motion.¹¹

⁹ Respondents did not address themselves to the fact that the federal complaint also invoked jurisdiction under 28 U.S.C. 1331.

¹⁰ Petitioner's reply brief was out of time and oversize. A motion for leave to file it was denied; accordingly, that brief is "lodged" rather than "filed".

¹¹ The effect of the order staying the issuance of the mandate of the Court of Appeals is to continue the vitality of a notice of lis pendens recorded at the time the action in the district court was filed. The purchaser at the trustee's sale, who is the party affected thereby, has indicated that it did not object to the sale being set aside if it received a refund of its purchase price and interest. (R., 60)

REASONS FOR GRANTING THE WRIT

There are two reasons for granting the writ in this case:

(1) A decision of a Court of Appeals which decides a controlling question of state law in a manner in conflict with applicable state statutory and decisional law so as to deprive a litigant of an important federally conferred right should be reversed;

(2) This Court has never reviewed, from the standpoint of state action considerations and due process, any of the various state non-judicial foreclosure laws, which generate a great deal of litigation; and the impact of the *Sniadach* progeny on these procedures should be elucidated.

I

Certiorari Should Be Granted to Reverse A Judgment of a Court of Appeals Which Decides a Controlling Question of State Law in a Manner Conflicting with Applicable State Statutory and Decisional Law so as to Deprive a Litigant of a Federally Conferred Right.

The case at bench presents the familiar question of the res judicata effect of a prior state court judgment in a subsequent section 1983 federal action. The question has been before this Court many times¹²; it has been the subject of conflicting decisions of the Court of Appeals¹³; of law review articles¹⁴; and it is presently the subject of a bill in the current Congress.¹⁵

In the case at bar, the question appears in an unusual context. Petitioner contends, as he did before the Court of Appeals, that federal courts must apply *state* law to determine the preclusive effects of a prior state court judgment; and that under applicable

¹² See e.g. *Huffman v. Pursue, Ltd.* 420 U.S. 592, 606 n. 18 (1975), the Court expressly declining to decide the question.

¹³ See e.g. *Lombard v. Board of Education* 502 F. 2d. 631 (2d. cir., 1974), holding that constitutional issues not litigated in a prior state court action may be litigated in a subsequent section 1983 proceeding; and *Scoggin v. Schunk*, 522 F. 2d. 436 (9th cir., 1975) holding precisely the contrary.

¹⁴ See e.g., Bartels, Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that "interfere" with State Civil Proceedings, 29 Stanf. L. R. 27; A. Vestal, State Court Judgment as Preclusive in Section 1983 Litigation in Federal Court, 27 Okl. Law. R. 185 (1974).

¹⁵ Senate Bill 35, 95th Congress.

state law, the prior California declaratory judgment was dispositive only of issues actually litigated.

Petitioner urges that in affirming the dismissal of his section 1983 action, the Court of Appeals ignored a long line of decisions of this Court which require a federal court to apply state law to determine the preclusive effect of a state court judgment, and also overruled, *pro tanto* prior decisions of the Court of Appeals itself to the same effect. Petitioner urges that where, as here, state law limits the preclusive effect of a particular judgment obtained under the law of the state to issues actually litigated therein, a federal court may not thereafter confer a *greater* preclusive effect on such judgment.

State Law Controls the Construction of a State Court Judgment in a Federal Court

It is well settled that state law governs the preclusive effect to be given a state court judgment in federal court; *Union & Planter's Bank v. Memphis*, 189 U.S. 71 (1903) and it is equally well settled that a federal court may not accord a prior state court judgment a *greater* preclusive effect than it had under the law of the rendering state.¹⁶ *People of the State of New York ex rel Halvey v. Halvey* 330 U.S. 610 (1947). To similar effect are numerous decisions of the Court of Appeals for the Ninth Circuit itself. See *Neale v. Goldberg*, 525 F. 3d. 332 (9th cir., 1975); *Nev.-Cal. Electric Secur. Co. v. Imperial Irrigation District*, 85 F. 2d. 886 (9th cir., 1936), *cert. den.* 300 U.S. 662. The decision of the Court of Appeals in the case at bar is thus contrary to the great weight of authority.

No Litigation of Constitutional Questions in the Superior Court

Contrary to the assertion made in the opinion of the Court of Appeals (App. A) there was no litigation of constitutional questions in the Superior Court, as is clear by inspection of the complaint in that action (App. F). To the extent that the judgment of the Court of Appeals depends on this assertion, it should be reversed on grounds of plain error.

¹⁶ There are, however, decisions holding that a federal court may accord such a judgment a *lesser* preclusive effect. *Lombard*, *supra*, p. 8, fn. 13.

A California Declaratory Judgment Concludes Only Issues Actually Litigated and Declared

Petitioner urges that a California declaratory judgment, obtained pursuant to section 1060 *et. seq.* of the California Code of Civil Procedure, concludes only issues necessarily litigated and actually declared, and does *not* conclude issues which were not so litigated. Such declaratory judgments are thus *exceptions* to the usual rule of the doctrine of res judicata that a judgment concludes not only matters actually adjudicated, but also, with respect to the same cause of action, matters which could have been litigated but were not.

Though there is ample authority for this proposition from other states,¹⁷ in both Restatements of Judgments¹⁸; in the treatise of the leading commentator on California law¹⁹, in the declaratory judgment act itself²⁰, in various annotations and treatises²¹, the California appellate courts have never considered the precise question. The Court of Appeals was thus confronted by a question of state law which would have been of first impression had it been decided by the California courts.²²

¹⁷ See *Cooke v. Gaidry* 218 S.W. 960 (Ky., 1949), *North Shore Realty Corp. v. Gallaher* 99 So. 2d. 255 (Fla. App. 1957); *In re Ditz' Estate*, 124 N.W. 2d. 814 (Ia., 1964) and most recently, *Atchison v. City of Inglewood* 506 P. 2d. 140 (Colo. 1973), all construing various versions of the Uniform Declaratory Judgment Act. This section, set out in App. E, is considerably more restrictive than the corresponding section of the California Declaratory Judgment Act, section 1062 of the California Code of Civil Procedure (App. D).

¹⁸ Restatement of Judgments 1st, sec. 77 and comment b thereof; Restatement of Judgments 2d, sec. 76, Tent. Draft No. 1 (1973). See App. G.

¹⁹ 4 Witkin, *California Procedure*, Judgments §172 ("[a declaratory judgment] should be binding as to matters declared, *though it is not a merger or bar.*") (emphasis added).

²⁰ Section 1062, California Code of Civil Procedure. (App. D).

²¹ 10 A. L. R. 2d. 782, particularly par. 3; 22 Am. Jur. 2d. sec. 102.

²² Implicit recognition of the proposition appears as dicta in *Neale v. Goldberg*, *supra*, fn. 17, but the court was able to dispose of that case on other grounds not applicable here (the cause of action in the prior state court suit was 'fully matured').

Nevertheless, all decisions of the California intermediate appellate courts which have considered the question of the res judicata effect of a California judgment are consistent with petitioner's position and inconsistent with respondents' view, which (as stated in their brief before the Court of Appeals) is that a California declaratory judgment is indistinguishable for res judicata purposes from any other California judgment.^{22.5} *Lortz v. Connell*, 273 Cal. App. 2d. 286, 78 Cal. Rptr. 6 (1969) (declaratory judgment does not preclude prevailing party from seeking damages in subsequent action); *Giese v. City of Los Angeles*, 77 Cal. App. 2d 1029, 175 P. 2d. 562 (1946). (actions for declaratory relief exception to general rule that party must litigate all claims arising from a single transaction in one action or they will be lost by merger or bar.

The Judgment of the District Court Should Have Been Reversed or Reversed with Directions to Abstain

The Court of Appeals, engrafting onto California's declaratory judgment act a new requirement, not enacted by the legislature, that a litigant availing himself of its provisions must raise all issues in an action therefor, affirmed the judgment of the District Court which accepted respondents' defense of res judicata. Petitioner urges that this decision, stemming from an erroneous determination of a controlling question of California law should have been reversed. Not only does the decision of the Court of Appeals preclude relief for petitioner in the federal courts, it also precludes relief (via the doctrine of the law of the case) in state courts as well.

While it is well settled that under certain circumstances a federal court may of necessity decide questions of state law, a federal court must decide such questions in the manner in which such questions would be decided by the highest court of the state; where state law controls, the federal court must apply it "... rather than ... prescribe a different rule, however superior it may appear to be ..." *West v. American Tel. & Tel. Co.* 311 U.S. 223, 236-237. (1940). Considerations of judicial

^{22.5} Contrary to the opinion of the Court of Appeals, *Dills v. Delira* does not support respondents' position. *Dills* does not deal with the question of res judicata at all.

efficiency and economy, the proliferation of litigation—especially section 1983 litigation—and similar policy considerations are important and may furnish, at least to some extent, a rationale for a strict application of the doctrine of res judicata in those situations where an unsuccessful state court litigant seeks relief in a subsequent federal action.²³ Such considerations, however, cannot justify an intrusion by the federal judiciary into an area which properly belongs to the California legislature. The res judicata effect of a California judgment in the California courts is solely within the province of the California legislature and courts; and petitioner urges that federal courts are constrained to adhere to that law.

II

Certiorari Should Be Granted to Determine Whether or Not California's Non-Judicial Foreclosure Law Involves Sufficient State Action to Subject It to Constitutional Strictures of Due Process and Equal Protection.

Commencing in 1969 with *Sniadach v. Family Finance Co.*, 395 U.S. 337, this Court has reviewed a number of creditor's remedies and determined whether or not they pass constitutional muster. To date, however, the Court has never decided a case involving a "non-judicial foreclosure statute"—i.e. foreclosure under a deed of trust containing a power of sale.

The economic and social importance of this particular creditor's remedy can scarcely be overstated. The question of whether California's non-judicial foreclosure law involves a sufficient quantum of state action to trigger the imposition of constitutional safeguards of due process and equal protection and, if it does, whether the law as enacted and applied is constitutionally adequate, has never been considered by either the California Supreme Court or by the Ninth Circuit.²⁴ Elsewhere, comparable

²³ Indeed, senate bill 35, *supra* p. 8, fn. 15, drastically restricts the use of res judicata as a defense to section 1983 actions.

²⁴ The statute has been considered by a federal district court and a California intermediate appellate court; state action has been found lacking. See *Lawson v. Smith* 402 F. Supp. 851 (N.D. Cal., 1975); *Strutt v. Ontario Savings & Loan*, 11 Cal. App. 3d. 547, 90 Cal. Rptr. 69 (1970).

—but distinguishable—non-judicial foreclosure statutes have been considered by federal courts in the District of Columbia, Texas, Michigan, North Carolina and most recently, Arizona. Two district court decisions have found state action present in the foreclosure statutes of Michigan and North Carolina²⁵ while it has been found to be absent in the foreclosure statutes of Michigan, District of Columbia Texas, and Arizona.²⁶

Petitioner urges that the question of whether or not California's statutory scheme involves sufficient state action to require the imposition of constitutional safeguards is of great public importance and is deserving of consideration by this Court.

Indicia of State Action

While this petition is not the appropriate place for a detailed analysis of this question, some of the factors which lead to a conclusion that the California statute does indeed involve the requisite quantum of state action to subject it to subject it to constitutional provisions of the Fourteenth Amendment may be summarized as follows:

1. Expansion of the creditor's remedy beyond the limits existing under the common law. The present statutory scheme expands the remedy of non-judicial foreclosure by giving the creditor several rights he did not possess at common law. Some, but not all, of these are set forth in paragraphs 3, 4, and 6, *infra*. Such expansion is "not the final answer to the touchstone of state action," *Adams v. Southern California First National Bank*, 492 F. 2d. 324 (9th cir., 1973) but it is an important factor to be considered. See, e.g., *Culbertson v. Leland*, 528 F. 426 (9th cir., 1975); *Parks v. "Mr. Ford"*, - F. 2d. -, 45 U.S. L. W. 2500 (3rd cir., 1977).

²⁵ *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975); *Garner v. Tri-State Investment Co.* 382 F. Supp. 377 (E.D. Mich. 1974).

²⁶ *Northrip v. F.N.M.A.* 527 F. 2d. 23 (6th cir., 1975); *Bryant v. Jefferson Savings & Loan* 509 F. 2d. 511 (D.C. Cir., 1974); *Barrera v. Security Building & Investment Coop.* (5th cir., 1975), *Kenly v. Miracle Properties, Inc.* 412 F. Supp. 1072 (D. Ariz., 1976).

2. Pervasiveness of state regulation. The California statute completely defines and delimits the procedures to be used in a non-judicial foreclosure and to a far greater extent than any of the statutes in jurisdictions whose statutes were found not to involve state action. This alone, without more has been held insufficient to support a finding of state action, cf. *Jackson v. Metropolitan Edison Co.* 419 U.S. 345, but it too, is a factor to be considered. Of particular importance in the instant case are the notice provisions of the statute, contained in section 2924b of the California Code of Civil Procedure. Petitioner urges that the requirement that a change of address notice be executed, acknowledged and recorded before it is effective, and denying any effect to a simple letter, is state action *per se*.

3. Deprivation of property rights without notice or hearing. The California non-judicial foreclosure procedure is initiated when the "trustee" executes and records a "Notice of Default and Election To Sell." The mere recording of such a notice deprives the homeowner of marketable title and operates to prevent him from conveying or encumbering the property. The notice itself contains the creditor's statement of the amount due, even if such amounts are in dispute; and typically, the filing of such a notice will ultimately result in the homeowner being required to pay additional fees. The creditor posts no bond, files no affidavit or declaration whatever to obtain this remedy. Petitioner urges that this procedure involves the delegation by the state to private individuals, here the power to adjudicate disputes (here, disputes over the amount due the creditor) and of the courts and the sheriff to attach property, inasmuch as the recording of the notice of default has virtually the same effect on title to the property as a formal writ of attachment would have. Such delegation converts the acts of a private individual—the trustee—into acts of the state itself.

4. Seizure of property unrelated to debt. The purchaser at a trustee's sale is entitled to evict the former owners (or those holding under them) by statutory unlawful detainer, section 1161 (a) (3) of the California Code of Civil Procedure. When

the eviction takes place, the purchaser (or his successor in interest) acquires a lien for "storage charges" on all personalty left on the premises. California Code of Civil Procedure, section 1174(d). This lien is wholly statutory and did not exist at common law in California. *Hitchcock v. Hassett* 71 Cal. 331, 12 P. 228 (1886). California courts have held that, absent the statute, the trustee's sale purchaser would be left to his common law remedy of ejectment. *Greene v. Municipal Court*, 51 Cal. App. 3d. 446, 124 Cal. Rptr. 139. That remedy, of course, requires the trustee's sale purchaser to prove his title and does not give him a lien on the trustor's personalty following an eviction.

5. Perhaps the most compelling indication that the requisite state action is present in the California statute are the provisions of section 2924 of the California Civil Code, providing that a recital in the trustee's deed that the relevant requirements of law respecting recording and mailing of the various notices required are prima facie evidence thereof and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice. This Court has held that such conclusive evidentiary presumptions violate the due process clause of the Fourteenth Amendment. *Western & A.R.R. Co. v. Henderson*, 279 U.S. 639. (1929). Like Professor Hetland,²⁷ petitioner believes that only the state can "enact and enforce a policy precluding litigation over fact questions by ordering them to be true when they are false."

It should be noted that although the foreclosure statutes in some of the other states considered in *Barrera*, *Bryant*, *Northrip*, *Turner* and *Kenly*, *supra*, p. 13, fn. 25, 26, contain provisions making the trustee's deed *presumptive* evidence of compliance with the notice provisions, only California and Arizona have such provisions.

²⁷J. Hetland, *Secured Real Estate Transactions*, California Continuing Education of the Bar, 1974. Chapter 8 contains a lengthy discussion of the California non-judicial foreclosure statute and a critique thereof.

6. Finally, the state imposes *criminal* sanctions on a trustee's sale bidder who fails to deliver the amount of his bid; section 2924b of the California Civil Code makes such failure a misdemeanor.

It is often argued that creditor's remedies which arise from a contract between two parties are private and that state legislation regulating such remedies does not convert them from private action to state action. A notable example of this argument can be found in the automobile repossession cases, e.g. *Adams, supra*; *Turner v. Impala Motors*, 503 F. 2d. 607 (6th cir., 1974). This argument is inapplicable to the case at bar, as is clear when one considers what the situation would be if no statute existed: the lender would then stand in the position of any other creditor and be obliged to establish his debt judicially.

Petitioner urges that the California statute clearly reveals a "... sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Jackson, supra*.

California's Non-judicial Foreclosure Law Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment

The most serious difficulty with the notice provisions of the California statute is that the trustee is not required to do anything to assure that the trustor will receive actual notice; compliance with the statute is sufficient, and the statute only requires that notice be sent to the address given in the deed of trust or subsequent request for notice. This is true even if that address is known by the trustee to be obsolete, and the trustee has actual notice of the true address; or if the notice is returned as undeliverable. *McClatchey v. Rudd*, 239 C.A. 2d. 605 (1966); *Strutt v. Ontario Saving & Loan* 28 C.A. 3d. 866; 105 Cal. Rptr. 395; *Strutt, supra*, p. 12, fn. 24. There is nothing in the standard California trust deed—or indeed, in the deed in the case at bar to warn the trustor of the importance of, or procedure for

changing, the address to which foreclosure notices are to be sent.²⁸ Parenthetically, it should be noted that the "trustee" who conducts the foreclosure sale, usually a title company or organization engaged solely in that business, is not a trustee in the usual sense of the word. Under California law, his status is merely that of an agent for the lender, obliged to carry out his directions. See, e.g. *Fleisher v. Continental Auxiliary Co.* 215 Cal. App. 2d. 136, 30 Cal. Rptr. 137 (1963); section 2934a of the California Civil Code.

It is thus quite clear that the notice procedure authorized by California law falls far short of the standard set forth by this Court in *Mullane v. Central Hanover Bank*, 337 U.S. 306 (1950). Absent statutory authorization to send only one notice to a particular address, whether current or not, trustees might well exert greater efforts to insure that trustors received actual notice. There have been egregious cases in which trustees sent the required notices to addresses they knew to be obsolete so that the trustor did not learn of the impending foreclosure sale until the 90 day redemption period had expired. See e.g., *Lupertino v. Carabal*, 35 Cal. App. 2d. 742, 111 Cal. Rptr. 112. None of these cases have considered the constitutional questions involved, however.

Quite aside from the notice question presented by this case, there are serious due process deficiencies in California's non-judicial foreclosure law. See, e.g., *Hetland, supra*, section 8.5. The statute has enormous potential for injustice and abuse and the reports are replete with many examples thereof. See, e.g., *Bisno v. Sax*, 175 Cal. App. 2d. 714, 346 P. 2d. 816 (1959); *Gonzales v. Gem Properties, Inc.* 37 Cal. App. 2d. 1029; 112 Cal. Rptr. 904 (1974); *Lupertino, supra*. If the Court finds the requisite state action to be present in the California statute, the way will be open for some of these abuses to be corrected.

Petitioner's Notice: Equal Protection

As noted by the Court of Appeals in its opinion (App. A) petitioner had actual notice (though fortuitously, and by

²⁸ Pursuant to Supreme Court Rule 21(1) the clerk of the Court of Appeals is requested to transmit a copy of the deed to the Court prior to docketing the instant petition.

means unrelated to respondents) of the impending foreclosure partway through the 90 day redemption period. The Court of Appeals held that "... this finding cannot be relitigated and is in itself ground for dismissing the complaint."

Petitioner respectfully disagrees. The fact that petitioner had actual notice partway through the 90 day redemption period was never in dispute. Petitioner submits, however, that the fact does not require dismissal of the complaint, for if the state has enacted a statute giving trustors 90 days to cure any alleged default, a statute which operates in a fashion to give some persons against whom it is applied less than 90 days notice of an impending foreclosure—or indeed, as in *Lupertino*, notice after the period had expired altogether—is a clear denial of equal protection.

Because of acceleration provisions in deeds of trust, trustees' fees and other related costs, a trustor who seeks to cure a default will typically have to pay a substantial amount of money. Presumably the legislature determined that 90 days was a sufficient period for a trustor to obtain the requisite funds. In the case at bar, petitioner made tender of all sums previously demanded by respondents more than 90 days from the filing of the notice of default but less than 90 days from petitioner's receipt of actual notice. If the statute is applied in such a way as to give some trustors less than 90 days' notice, petitioner urges that it is unconstitutional as applied and denies those persons the equal protection of the laws, in contravention of the Fourteenth Amendment.

Conclusion

For the reasons hereinabove set forth, we pray that the writ be granted.

Respectfully submitted,

ROBERT L. CHAZIN

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Petitioner in Pro Se.

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APPENDIX A*

United States Court of Appeals
for the Ninth Circuit

No. 75-1753, December 2, 1976

ROBERT L. CHAZIN

v.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL
SAVINGS AND LOAN ASSOCIATION; T. D. SERVICE COMPANY,
and DOES I-IV

Appeal from the United States District Court for the Northern District of California

Sneed and Kennedy, Circuit Judges.

Richey, District Judge.

Plaintiff brought this action in the United States District Court for the Northern District of California under 42 U.S.C. section 1983. The district court ruled that the action was barred by the doctrine of res judicata. We affirm.

Before filing the complaint in the instant suit, plaintiff brought an action for declaratory relief in state court to prevent foreclosure on his property. In that action, he alleged that the notice provisions of California Civil Code section 2924b were inadequate. After making specific findings of fact, the state trial court rendered judgment against Chazin. The state appellate courts affirmed, and the judgment is now final.

Plaintiff's federal action is nearly identical to the state action: the parties involved, the facts alleged, and the law challenged are all similar. In the federal suit he claims that because of deficiencies in the statutory notice provisions, the state foreclosure proceedings violated his constitutional rights. Claims that could have been raised in an earlier state proceeding are barred by the doctrine of res judicata. *Scoggin v. Schrunk*, 522 F.2d

* Summary affirmance reported at 547 F.2d 1174.

436, 437, (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976). This rule applies to actions brought under 42 U.S.C. section 1983. *Id.* at 437. Moreover, *res judicata* principles apply even though plaintiff sought declaratory relief in his state action. *See Dills v. Delira Corp.*, 145 Cal. App. 2d 124, 302 P.2d 397, 401 (1956); *cf. Lortz v. Connell*, 273 Cal. App. 2d 286, 301, 78 Cal. Rptr 6 (1969).

Finally, we note that the state trial court specifically found that as early as July 17, 1973, plaintiff had actual notice that his loan was in default and that foreclosure proceedings under the deed of trust had been commenced. Although he had the opportunity to tender a sum to reinstate the loan, he failed to do so within the statutory period. This factual finding cannot be relitigated and is in itself ground for dismissing the complaint.

Affirmed.

APPENDIX B

United States District Court for the
Northern District of California

No. C-74-2364 RHS, January 27, 1975

ROBERT L. CHAZIN

v.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL
SAVINGS AND LOAN ASSOCIATION, T. D. SERVICE COMPANY,
and DOES I through IV.

Plaintiff's motion for leave to file an amended complaint is hereby granted. Plaintiff's motion for preliminary injunction and defendants' motion for summary judgment and the briefs and other documents related thereto will be deemed applicable to the amended complaint.

The amended complaint, brought under 42 U.S.C. §1983, seeks: (1) a declaration that Cal. Civ. Code §2924b violates the Fourteenth Amendment's due process clause by authorizing the foreclosure sale of realty under a deed of trust without actual notice to the trustor, though actual notice could be given; (2) a declaration that as a result of the due process violation, the foreclosure sale of plaintiff's realty is void, and (3) associated relief, including special and general damages. However, since plaintiff could have raised his due process contentions in a prior state-court action dealing with the then-threatened foreclosure of his realty, and that action has proceeded to judgment, *res judicata* precludes him from raising these contentions here [*Francisco Enterprises, Inc. v. Kirby*, 482 F.2d 481, 485, 485n (9th Cir. 1973)].

At any rate, the requisite state action* was lacking in the transactions at issue, which had no significant state involvement, but involved only private parties and a basically private remedy, albeit one put in a statute [see *Adams v. Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), *appeal pending* (finding no state action in self-help repossession procedures authorized by Cal. Comm. Code §§ 9503, 9504)].

Therefore, the motion for summary judgment is granted, and the motion for preliminary injunction is denied.

(s) ROBERT H. SCHNACKE
U.S. District Judge

Judgment

In accordance with the accompanying order,
IT IS ADJUDGED that the complaints and action are dismissed, without further leave to amend.

(s) ROBERT H. SCHNACKE
U. S. District Judge

* Of course, the due process clause of the 14th Amendment is violated only by state action, not by private action.

APPENDIX C

United States Court of Appeals
for the Ninth Court

No. 75-1753, February 1, 1977

ROBERT L. CHAZIN

v.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL
SAVINGS AND LOAN ASSOCIATION; T. D. SERVICE COMPANY,
and DOES I - IV

Appeal from the United States District Court
for the Northern District of California

Sneed and Kennedy, Circuit Judges, and
Richey, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed and Kennedy have voted to reject the suggestion for a rehearing en banc, and Judge Richey has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for a rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

California Civil Code*

Section 2924.

Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which such mortgage or transfer is a security, such power shall not be exercised except where such mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until (a) the trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default, identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded or a description of the mortgaged or trust property and containing a statement that a breach of the obligation for which such mortgage or transfer in trust is security has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation; (b) not less than three months shall thereafter

*All statutes in Appendix D are given as in force June 18, 1973.

elapse; and (c) after the lapse of the three months the mortgagee, trustee or other person authorized to make the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that set forth in Section 2924f. A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices for which requests have been recorded or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

Section 2924b.

Request; recording; contents; form. Any person desiring a copy of any notice of default and of any notice of sale under any deed of trust or mortgage with power of sale upon real property, as to which deed of trust or mortgage the power of sale cannot be exercised until such notices are given for the time and in the manner provided in Section 2924 may, at any time subsequent to recordation of such deed of trust or mortgage and prior to recordation of notice of default thereunder, cause to be filed for record in the office of the recorder of any county in which any part or parcel of the real property is situated, a duly acknowledged request for a copy of any such notice of default and of sale. This request shall be signed and acknowledged by the person making the request, specifying the name and address of the person to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation thereof and the book and page where the same is recorded or the recorder's number and shall be in substantially the following form:

"In accordance with Section 2924b, Civil Code, request is hereby made that a copy of any notice of default and a copy of

any notice of sale under the deed of trust (or mortgage) recorded
....., 19 .., in Book page records of
County, (or filed for record with recorder's serial number,
..... County) California, executed by as trustor
(or mortgagor) in which, is named as beneficiary (or
mortgagee) and as trustee be mailed to at
Name Address Signature

Recorder's duties. Upon the filing for record of such request,
the recorder shall index in the general index of grantors the
names of the trustors (or mortgagor) recited therein and the
names of persons requesting copies.

Mailing notice. The mortgagee, trustee or other person
authorized to record the notice of default, shall within 10 days
following recordation of such notice of default deposit or cause
to be deposited in the United States mail an envelope, registered
and with postage prepaid, containing a copy of such notice with
the recording date shown thereon, addressed to each person
whose name and address are set forth in a duly recorded request
therefor, directed to the address designated in said request, and
at least 20 days before date of sale the mortgagee, trustee or
other person authorized to make the sale shall deposit or cause
to be deposited in the United States mail an envelope, registered
and with postage prepaid, containing a copy of the notice of the
time and place of sale, addressed to each person whose name
and address are set forth in a request therefor recorded, within
the time herein provided.

Request in instrument; publication; service. Any deed of
trust or mortgage with power of sale hereafter executed upon
real property may contain a request that a copy of any notice
of default and a copy of any notice of sale thereunder shall be
mailed to any person a party thereto at the address of such
person given therein, and a copy of any notice of default and of
any notice of sale shall be mailed to each such person at the
same time and in the same manner required as though a separate
request therefor had been filed by each of such persons as herein

authorized. If any deed of trust or mortgage with power of sale
executed after September 19, 1939, except a deed of trust or
mortgage of any of the classes excepted from the provisions of
Section 2924 does not contain a request of the trustor or mort-
gagor for special notice at the address of such person given there-
in or does contain such request but no address of such person is
given therein and if no request for special notice by such trustor
or mortgagor in substantially the form set forth in this section
has subsequently been recorded, a copy of the notice of default
shall be published once a week for a least four weeks in a news-
paper of general circulation in the county in which the property
is situated, such publication to commence within 10 days after
the filing of the notice of default. In lieu of such publication a
copy of the notice of default may be delivered personally to the
trustor or mortgagor within such 10 days or at any time before
publication is completed.

Effect of request upon title or as notice. No request for copy
of any notice filed for record pursuant to this section nor any
statement or allegation in any such request nor any record
thereof shall affect the title to real property or be deemed notice
to any person that any person requesting copies of notice has or
claims any right, title or interest, in, or lien or charge upon the
property described in the deed of trust or mortgage referred to
therein.

California Code of Civil Procedure

Section 1060. [Declaratory relief]

Any person interested under a deed, will or other written instru-
ment, or under a contract, or who desires a declaration of his
rights or duties with respect to another, or in respect to, in ,over
or upon property, or with respect to the location of the natural
channel of a watercourse, may, in cases of actual controversy
relating to the legal rights and duties of the respective parties,
bring an original action in the superior court or file a cross-

complaint in a pending action in the superior or municipal court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

Section 1062. [Other remedies not affected]

The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts.

APPENDIX E

Uniform Declaratory Judgments Act

Section 8.

Supplemental Relief. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

APPENDIX F

Superior Court of the State of California
for the County of Alameda

No. 440595, September 17, 1973

ROBERT L. CHAZIN

vs.

TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION, A
CALIFORNIA CORPORATION, WILLIAM OSTRANDER, DOES I,
II, III, IV

Complaint for Declaratory Relief

Plaintiff alleges:

I

Defendent Twin Pines Federal Savings and Loan Association (hereinafter Twin Pines) and Defendant T D Corporation are California Corporations organized and doing business in California pursuant to the laws of the State of California.

II

Defendants Twin Pines and T D Corporation are residents of the County of Alameda, State of California, and were such at all times mentioned herein.

III

Plaintiff is informed and believes and thereon alleges that defendants William Ostrander and Does I and II are the agents, servants and employees of defendant Twin Pines, and were acting within the scope of their agency and employment at all times mentioned herein.

IV

Plaintiff is informed and believes and thereon alleges that defendants Doe III and Doe IV are the agents, servants and employees of defendant T D Corporation, and were acting

(30)

- 31 -

within the scope of their agency and employment at all times mentioned herein.

V

On or about February 24, 1971 defendant Twin Pines, as beneficiary, and Plaintiff as Trustor, made and entered into a first Deed of Trust, evidenced by a written instrument, a copy of which is attached hereto, marked Exhibit "A", and incorporated herein by reference as though fully set forth. On or about March 3, 1971, said first deed of trust was recorded in the office of the County Recorder of the County of Alameda, State of California.

VI

On or about March 3, 1971, Plaintiff recorded a Request for Notice of Default and Notice of Sale under the Deed of Trust with the Office of the County Recorder of the County of Alameda, State of California. Said Request specified Plaintiff's mailing address to be 2322 Russell Street, Berkeley, California.

VII

On or about December 1, 1970, Eleanor B. Lamson, as grantor granted certain real property in the City of Berkeley to Robert Chazin as grantee, said property being the subject matter of the first deed of trust described and referred to in paragraph V above. Said grant deed was recorded by Plaintiff on March 3, 1971 at the Office of the County Recorder, County of Alameda, State of California. Said Grant deed specified plaintiff's address as 2916 Elmwood Court, Berkeley, California, 94705. A copy of said Grant Deed is attached hereto, marked Exhibit "B", and incorporated herein by reference as though fully set forth.

VIII

At all times since February 24, 1971, Plaintiff's actual address has been and is 2916 Elmwood Court, Berkeley, California 94705.

IX

At all times since February 24, 1971, defendants, and each of them had actual knowledge that plaintiff's true and actual address was and is 2916 Elmwood Court, Berkeley, California 94705.

X

Plaintiff is informed and believes and thereon alleges that from and since March 31, 1971, all mail and other correspondence, of every type whatsoever sent by defendants to Plaintiff has been sent to Plaintiff at his true and actual address, to wit: 2916 Elmwood Court, Berkeley, California 94705. The actual number of letters and other correspondence so sent by defendants is not known to Plaintiff at this time and Plaintiff prays leave of Court to amend this complaint, or any amendment thereof, when the same has been ascertained. Plaintiff is informed and believes and thereon alleges that said number of letters is in excess of one dozen.

XI

On or about June 18, 1973, defendants, and each of them caused a notice of default to be mailed to Plaintiff at 2322 Russell Street, Berkeley, California. In so doing, defendants were acting as the agents and servants of each other and were acting within the scope of their agency and employment.

XII

On June 18, 1973, Plaintiff did not and at no time thereafter, did Plaintiff reside at 2322 Russell Street, Berkeley, California, nor did Plaintiff receive mail at said address.

XIII

Plaintiff never actually received written notice of default.

XIV

An actual controversy has arisen and now exists between Plaintiff and Defendants concerning their respective right and duties in that Plaintiff contends that, once having actual knowledge of Plaintiff's true mailing address, and having addressed numerous letters and other communications to Plaintiff at his true address, Defendants should have mailed their Notice of Default to Plaintiff at the true address known to them to be the address where Plaintiff would actually receive such notice. Defendants claim that they need only mail notices to the address specified in Plaintiff's recorded request for notice.

XV

Plaintiff is informed and believes and thereon alleges, that defendants, and each of them knew at all times mentioned herein, that Plaintiff would not receive notice of default mailed by them to any other address but 2916 Elmwood Court, Berkeley, California 94705.

XVI

Plaintiff desires a judicial determination of his rights and duties, and a declaration as to which of the parties herein is correct regarding the mutual rights and responsibilities of the parties herein.

XVII

Such a declaration is necessary and appropriate in order that Plaintiff may ascertain his rights and duties, and because defendants' right of foreclosure will be perfected on September 12, 1973, in which case Plaintiff will lose his statutory right to cure his default.

XVIII

Wherefore, Plaintiff prays judgment against defendants as follows:

1. For a declaration that defendants were obliged to send their notice of default to Plaintiff at his true address, known to them.
2. For a declaration that any and all notices of default mailed to Plaintiff at any address other than his true address, known to defendants are null and void and of no legal effect.
3. For such other and further relief as to the Court may seem proper.

(s) GEORGE A. LYDON
Attorney for Plaintiff

September 17, 1973

APPENDIX G

Restatement of Judgments 2d. Tentative Draft No. 1 (1973)

Section 76.

When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant. Instead, he is seen as merely seeking a judicial declaration as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, the plaintiff or defendant may pursue further declaratory or injunctive relief in a subsequent action.